Filed 12/10/20 In re Chance P. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re CHANCE P., a Person Coming Under the Juvenile Court Law.	B303573
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. BRANDON P. et al., Defendants and Appellants.	(Los Angeles County Super. Ct. No. CK40820E)

APPEAL from an order of the Superior Court of Los Angeles County, Steff R. Padilla, Juvenile Court Referee. Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant Brandon P.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant Vanessa R.

No appearance for Respondent.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Minor.

INTRODUCTION

Brandon P. and Vanessa R., parents of three-year-old Chance P., appeal from the juvenile court's order under Welfare and Institutions Code section 361.3[1] denying relative placement of Chance with Chance's paternal great-aunt after the juvenile court found it would not be in his best interest. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Chance Is Born and Detained*

In August 2017, Vanessa, while in custody, gave birth to Chance. Vanessa called Mr. and Mrs. H., the non-relative prospective adoptive parents of Vanessa's four-year-old daughter, Ireland K., and asked them to "take" Chance. Given "the exigency of the situation," the Los Angeles County Department of Children and Family Services detained Chance and placed him with Mr. and Mrs. H.

The Department filed a petition under section 300, subdivisions (b)(1) and (j), alleging Chance came within the jurisdiction of the juvenile court because of Vanessa's history of

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[1] Statutory references are to the Welfare and Institutions Code.

substance abuse. Because Vanessa failed to reunify with her other four children, and the juvenile court previously denied her family reunification services under section 361.5, subdivision (b)(10) and (11), the Department stated that it would not recommend reunification services in Chance's dependency case and that the court could order "immediate permanency planning through termination of parental rights."

At the detention hearing, where neither parent appeared, the juvenile court ordered the Department to "assess all referred relatives" for possible placement and gave the Department discretion to place Chance with any appropriate relative. The court set and then continued several times a combined jurisdiction and disposition hearing. In November 2017 Mr. and Mrs. H. adopted Ireland.

B. *The Juvenile Court Sustains the Petition*

On January 22, 2018, five months after the detention hearing, the juvenile court received a report stating that Brandon was incarcerated, that he did not know if he was Chance's father, and that Chance's dependency case was "not his priority" because he was facing a lengthy prison sentence. At Brandon's request, the court ordered a paternity test. A Department social worker sent Brandon a letter requesting "information [for] any relatives . . . [he] would like assessed for placement." Vanessa, who did not provide any relative information, continued to identify Mr. and Mrs. H. as the preferred "permanency provider" for Chance.

The Department filed an amended petition alleging Brandon also had a history of substance abuse. The court continued the jurisdiction and disposition hearing several more

times, eventually setting it for August 20, 2018, over a year after Chance had been detained.

The juvenile court sustained the amended petition, found Brandon was Chance's biological father, removed Chance from both parents, denied both parents family reunification services, and set a selection and implementation hearing under section 366.26 for December 17, 2018 and a permanency planning review hearing for February 19, 2019. Brandon asked the Department to assess his mother for possible placement, but she did not qualify. He also asked the Department to assess his grandparents and an aunt, Alice L. In September 2018 Alice began supervised weekly visits with Chance and "expressed interest in placement and adoption." Alice was approved for placement on December 13, 2018.

C. *A Series of Hearings Ensues*

At the December 17, 2018 hearing the juvenile court granted Alice unmonitored visitation with Chance and gave the Department discretion to allow overnight visits. Nevertheless, because Mr. and Mrs. H. also wanted to adopt Chance, the court issued a "do not remove order."[2] The court continued the section 366.26 hearing to (and reset the permanency planning review hearing for) February 5, 2019. For that hearing the Department filed a report recommending a permanent plan of adoption with Mr. and Mrs. H. because of their "sincere commitment to not only providing [Chance] with permanence and

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[2] A "do not remove" order prohibits a child protective agency from changing a child's placement without notifying minor's counsel and obtaining a court order. (*In re B.C.* (2011) 192 Cal.App.4th 129, 136.)

safety, but also maintaining sibling ties" with Ireland and "through visits with Chance's [other] siblings." After a series of further continuances the juvenile court set the section 366.26 hearing for November 5, 2019 (and the permanency planning review hearing for February 4, 2020). Meanwhile, Alice continued to visit consistently with Chance, including for extended overnight visits,[3] and Chance "was observed to be bonded and comfortable" with Alice and other paternal relatives.

In July 2019 a Department social worker spoke with Vanessa regarding a change of placement. Vanessa stated that she was "appreciative of [Alice] wanting to have Chance placed with her," but that Chance was "'happy, loved, and with his sister at [Mr. and Mrs. H.'s] house, [and she didn't] want him uprooted from the home he's been in all his life. He lives with his sister and she is close to him.'" Vanessa said that Mrs. H. "'loves the kids as her own and is a good mom.'" Vanessa stated, however, that if the Department was "ok with the change in [placement] order, she [was] also in agreement."

On November 5, 2019 the Department asked the juvenile court to lift the "do not remove order" and place Chance with Alice. The Department stated that, while both homes "have been deemed appropriate and both have expressed interest in providing Chance with permanency through adoption," it would

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[3] The court terminated Alice's overnight visits in February 2019 after Mr. and Mrs. H. notified the Department that Alice had taken pictures of Chance's genitals. Alice explained she took the pictures because she was concerned about an apparent rash. The parties agreed Alice "had no mal intention," and the court reinstated overnight visits in August 2019.

be in Chance's "best interest that he maintain the family connections that he has established" through Alice. The Department asked the court to continue the February 4, 2020 permanency planning review hearing because, in order for Alice to adopt Chance, he "would need to be in [Alice's] home for six months prior to finalization of the adoption." Counsel for Chance objected and argued Chance was suitably placed in a prospective adoptive home with his sibling. The court continued the section 366.26 hearing three days to November 8, 2019 and set a hearing under section 361.3 to consider relative placement for the same date.

At the November 8, 2019 hearing the Department argued "the biggest crucial fact in evaluating whether it would be in the best interest" of Chance for the court to place him with Alice was that, if Alice adopted Chance, she was "willing and open" to facilitate sibling visits between Chance and Ireland, whereas Mr. and Mrs. H. intended to "cut off all contact" with the paternal relatives after adoption. Both parents joined the Department's recommendation. Counsel for Brandon also argued that the factors under section 361.3 "weigh in favor of placement" with Alice: She maintained "consistent high quality visitation" with Chance, including 51 overnight visits; Chance and Alice had "a strong bond"; and Alice could "provide for [Chance's] needs" in "a safe and secure home."

Counsel for Chance argued that Chance, who was then two years old, had been in the care of Mr. and Mrs. H. since he was two days old and removal would harm him psychologically; that Chance was "immensely" bonded with Ireland, the only sibling Chance knew and had the opportunity to "grow together" with; and that Vanessa had only recently changed her mind about

Chance's placement. Counsel for Chance acknowledged the court had "a difficult task" because there were "two absolutely loving homes" wanting to adopt Chance and that "either way ties will be severed." The court continued the hearing again, this time to December 4, 2019, stating it would issue a ruling at that time.

At the December 4, 2019 hearing the juvenile court read section 361.3 out loud and addressed "the various criteria" listed in the statute. The court stated it was "going to go through each one: The best interest of the child including special physical, psychological, educational, medical, or emotional needs. The wishes of the parents. The parents clearly wish for the child to be with the paternal relatives. . . . Placement of siblings and half siblings in the same home. That's exactly what we have here. We have siblings that are living together. The good moral character of the relative. . . . The nature and duration of the relationship between the child and the relative. They have been visiting. They have been consistently visiting. . . . The ability of the relative to do the following: provide a safe, secure home—that is without question. . . . The safety of the relative's home, which is without question."

Counsel for the Department reminded the court that "one of the main issues" the court had to consider was Alice's willingness to allow Chance to "continue to have contact and have a relationship with" Ireland. The court stated it was "an argument without merit" because, even if Alice adopted Chance, Mr. and Mrs. H., as the legal parents of Ireland, could still deny visits between the siblings.

The juvenile court stated that, after thinking "long and hard about this case," the court would deny relative placement "based on the requirements of [section] 361.3." The court said

that Chance had been living with his sibling for two years and that, "long after we are all gone, that's the relationship that's going to matter." The court stated that Chance had never lived with Alice and that, in order for Alice to adopt him, the court would need to continue the section 366.26 hearing, which would deny Chance stability and permanence. The court stated that, while it did not know whether placement with Alice "would remain stable," the court was assured "beyond a reasonable doubt" that Chance was "stable, loved, and taken care of" in his current placement. The court expressed concern over Mr. and Mrs. H.'s refusal to allow relative contact, "but not to the point that [the court would] need to disrupt the stability [and] love between siblings and [Mr. and Mrs. H.]." The court ordered Alice and Mr. and Mrs. H. to discuss a potential post-adoption visitation agreement. Brandon and Vanessa timely appealed.

DISCUSSION

As a preliminary matter, the parties disagree whether Brandon and Vanessa, who were denied reunification services but whose parental rights have not yet been terminated, have standing to challenge the juvenile court's order.[4] (See *In re A.K.* (2017) 12 Cal.App.5th 492, 499 [parent whose reunification services have been terminated cannot establish that his or her "rights and interest . . . are injuriously affected" by an order denying relative placement]; *In re Jayden M.* (2014)

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[4] Although the Department argued in favor of relative placement in the juvenile court, it does not take a position in this appeal.

228 Cal.App.4th 1452, 1460 [when "reunification services have been terminated, the parent has no standing to appeal relative placement preference issues"].) The Supreme Court, however, has recognized that, even where the juvenile court has denied reunification services, a parent may appeal from a relative placement order "if the placement order's reversal advances the parent's argument against terminating parental rights." (*In re K.C.* (2011) 52 Cal.4th 231, 238.) Brandon and Vanessa contend reversal of the juvenile court's order would advance their (future) argument against terminating their parental rights because placing Chance with Alice could trigger the relative caregiver exception to adoption under section 366.26, subdivision (c)(1)(A), which does not require termination of their parental rights.[5] We need not resolve this issue because we conclude that, even if Brandon and Vanessa have standing, the juvenile court did not abuse its discretion in denying relative placement with Alice.

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[5] The relative caregiver exception in section 366.26, subdivision (c)(1)(A), provides that the juvenile court need not terminate parental rights if the "child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship." Although Alice has not expressed an interest in legal guardianship, and we do not "speculate whether [she] would pursue" that option (*In re Isaiah S.* (2016) 5 Cal.App.5th 428, 436), she is not precluded from doing so until parental rights are terminated. (See *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1054 ["[w]hile an alternative permanency plan to adoption may be unlikely on this record, it remains a statutory option for the juvenile court"].)

A. *Applicable Law and Standard of Review*

When "a child is removed from the physical custody of his or her parents . . . preferential consideration shall be given to a request by a relative" for placement. (§ 361.3, subd. (a).) Preferential consideration "'means "that the relative seeking placement shall be the first placement to be considered and investigated."'" (*In re Isabella G.* (2016) 246 Cal.App.4th 708, 719; see § 361.3, subd. (c)(1).) Section 361.3 "does 'not supply an evidentiary presumption that placement with a relative is in the child's best interests'" (*In re R.T.* (2015) 232 Cal.App.4th 1284, 1295), nor does it "constitute 'a relative placement *guarantee*'" (*In re K.L.* (2016) 248 Cal.App.4th 52, 65-66, fn. 4). Rather, the juvenile court must consider a list of factors in determining whether the court should place the child with a relative. (See *In re Isabella G.*, at p. 719 ["When considering whether to place the child with a relative, the juvenile court must apply the placement factors, and any other relevant factors, and exercise its independent judgment concerning the relative's request for placement."].) As the juvenile court recognized, these factors include the "'best interest of the child, . . . the wishes of the parent, . . . the good moral character of the relative, . . . the nature and duration of the relationship between the child and the relative, . . . the relative's desire to care for, and to provide legal permanency,'" and "'the ability of the relative to . . . [p]rovide a safe, secure, and stable environment . . . [e]xercise proper and effective care and control of the child[,] [and] [f]acilitate visitation with the child's other relatives.'" (*Id.* at p. 719, fn. 9; see § 361.3, subd. (a)(1)-(8).)

"The linchpin of a section 361.3 analysis is whether placement with a relative is in the best interests of the minor."

(*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 862-863; see *In re M.H.* (2018) 21 Cal.App.5th 1296, 1303-1304 [relative placement does not focus on "'the interest of extended family members but the interest of the child'"].) Thus, """regardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected."""" (*In re M.H.*, at p. 1304.) A juvenile court's order denying relative placement "will not be disturbed unless an abuse of discretion is clearly established." (*Id.* at p. 1305; see *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

B. *The Juvenile Court Did Not Abuse Its Discretion in Declining To Change Chance's Placement from Mr. and Mrs. H. to Alice*

In the first year of Chance's dependency case, neither Vanessa nor Brandon raised the issue of placing Chance with a relative. Vanessa never identified a relative for the court to consider placing Chance with; in fact, for most of the case, she wanted the court to place Chance with Mr. and Mrs. H. Brandon brought up the possibility of placing Chance with Alice only after the Department assessed his mother for placement and deemed her ineligible. During that time, Chance, Ireland, and Mr. and Mrs. H. continued to bond, making a change of placement all the more challenging. (See *In re M.H.*, *supra*, 21 Cal.App.5th at p. 1304 ["[t]he passage of time is a significant factor in a child's life; the longer a successful placement continues, the more important the child's need for continuity and stability becomes in the evaluation of [his or] her best interests"].) Faced with

"dueling" approved placements, the juvenile court set a hearing to address relative placement under section 361.3.

At the hearing, the juvenile court acknowledged that the section 361.3 factors would support placing Chance with Alice. The court recognized that Alice consistently visited and had bonded with Chance, that she had the desire and ability to care for him, that she had good moral character, that she could provide a safe home for Chance, that Brandon and Vanessa wanted the court to place Chance with her, and that Alice was willing to facilitate sibling visits with Ireland. But the issue for the court was not, as Vanessa asserts, simply whether the factors "were favorable as to Alice." The primary issue was whether changing Chance's placement (removing him from his prospective adoptive home and placing him with an appropriate relative) was in his best interest. (See *In re Jessica Z.* (1990) 225 Cal.App.3d 1089, 1102 [a relative placement request is essentially a change of placement request].) And the juvenile court concluded it was not.

The juvenile court's conclusion was not an abuse of discretion. The juvenile court stated that, because Chance had been in Mr. and Mrs. H.'s home his entire life, placing him with Alice would require continuing the section 366.26 hearing for several months to ensure the stability of a new placement. The court found it would not be in Chance's best interests to delay permanence and disrupt the stability Mr. and Mrs. H. had provided him. Vanessa correctly points out that placing Chance with Alice would not necessarily require the court to continue the hearing; the court could have lifted the "do not remove" order, placed Chance with Alice, proceeded to the section 366.26 hearing

without further delay, and set a review hearing in six months.[6] (See *In re Maria Q.* (2018) 28 Cal.App.5th 577, 594 ["[a]fter the selection of a permanency plan [at the section 366.26 hearing], the juvenile court is required to hold periodic review hearings at least every six months under section 366.3"].) But the court understood it would need to continue the hearing, not because the law required a continuance, but because the court did not know whether placement with Alice would be stable. (See *In re Logan B.* (2016) 3 Cal.App.5th 1000, 1009 [the overriding purpose of section 366.26 is "to provide 'stable, permanent homes'" for dependent children].) While Alice expressed a desire to adopt Chance, he had not been in Alice's care for more than a few days at a time, and he did not have any overnight visits during the six months the court reverted visitation to day visits. The court did not abuse its discretion in ruling that, if the court placed Chance with Alice, the court would need to continue the hearing to ensure the stability and permanence of that placement, as required by section 366.26.

Moreover, the parents' suggestion in support of their argument they have standing to appeal—that the relative caregiver exception to adoption could apply if the juvenile court's order were reversed—raises the possibility that Alice could pursue legal guardianship, a less stable option than adoption. (See *In re Samantha H.* (2020) 49 Cal.App.5th 410, 416

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[6] The juvenile court set the section 366.26 hearing on August 20, 2018. Because a hearing under section 366.26 must "be heard within 120 days from the time it was set," the court could have held the hearing immediately if it had placed Chance with Alice. (See *In re Richard C.* (1998) 68 Cal.App.4th 1191, 1196.)

[“‘[a]lthough guardianship may be a more stable solution than foster care, it is not irrevocable and thus falls short of the secure and permanent placement intended by the legislature’”].) Conversely, the juvenile court was certain (“beyond a reasonable doubt”) that Chance’s current placement was stable. Chance had been in Mr. and Mrs. H.’s care for two years (the entirety of his life), and they had already adopted his sibling. (See *In re Jessica Z.*, *supra*, 225 Cal.App.3d at p. 1100 [“it would have been inappropriate for the juvenile court to have afforded [the child’s] grandmother a relative placement preference under section 361.3” where the child “had lived with her foster family for almost a year—almost her entire life” and it “would have been detrimental to remove her”].)

Brandon argues the juvenile court abused its discretion by “prioritizing” Chance’s relationship with Ireland “at the expense of cutting [Chance] off from all paternal relatives.” The record does not support Brandon’s argument. The juvenile court did consider the siblings’ relationship and its long-term importance to Chance, which was entirely proper. (See § 361.3, subd. (a)(4) [the “court shall consider” the “[p]lacement of siblings and half siblings in the same home”].) But the court also considered the other factors listed in section 361.3 (i.e., the best interest of the child, the wishes of the parents, the relative’s ability to provide a safe home, etc.) and concluded that, on balance, the factors weighed in favor of continued placement with Mr. and Mrs. H., a ruling well within the court’s discretion.

Finally, the parties conceded in the juvenile court and concede on appeal that both Alice and Mr. and Mrs. H. were appropriate placement options. With Alice, Chance would be loved and cared for by paternal relatives and extended family

members. With Mr. and Mrs. H., Chance would be loved and cared for by proven caretakers, the only parental figures he knew, and would grow up with his sibling. Because either placement would promote Chance's interest, "we cannot say that the court abused its discretion in concluding that his [current] placement was in his best interest." (*In re M.H.*, *supra*, 21 Cal.App.5th at pp. 1305-1306; see *ibid.* [although "[p]lacement in this case presented an unusually difficult question," the juvenile court did not abuse its discretion because the court, "faced with two good options," was "fully aware of the difficulty of the choice and, with the parties before it, was best able to make the hard call of which placement, under the circumstances as they then existed, was in the minor's best interest"].)

DISPOSITION

The juvenile court's order is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J. RICHARDSON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.